No. 11,718

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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The briefs already filed by the parties comprehensively present their respective positions as to the issues involved. There is but one portion of appellee's brief that in the opinion of appellant warrants some further reply.

On pages 22 and 23 of its brief appellee argues (1) that the Commissioner of Internal Revenue was under no obligation, legally or normally, to make any corrections of the depreciation deductions taken by appellant on its tax returns for the years 1932 to 1935, even though he knew the deductions to be erroneous; and (2) that the taxpayer's efforts to correct those errors by filing amended returns after the Commis-

sioner had finally refused to correct the errors, did not deserve consideration because the returns were filed after the statute of limitations had run.

The statute of limitations referred to by appellee is the statutory period of limitations for making assessments of additional taxes. As to 1932 and 1933 the period expired two years after the filing of the return (Section 275, Revenue Act of 1932) and as to 1934 and 1935 the period expired three years after the filing of the return (Section 275, Revenue Acts of 1934 and 1936). Even if this statute of limitations has any bearing in this case, and we think it does not because there was never any tax liability due for the years 1932 to 1935, the Bureau of Internal Revenue has consistently maintained that the filing of amended returns extends the statute of limitations as to any tax disclosed by that return (IT 1714, Cum. Bul. Dec. 1923, p. 229, S.M. 1404, Cum. Bul. June, 1924, p. 335) and although there are some Tax Court decisions which appear to hold the contrary (*National Refining Co. of Ohio,* 1 BTA 236; *Mabel Elevator Co.,* 2 BTA 517, also involved in *U. S. v. Mabel Elevator Co.,* Dist. Ct. Minn. 17 F. (2d) 109, 6 AFTR 6495, *The Vitamin Co.,* 21 BTA 311), it was held in the case of *Horuff v. U. S.,* 80 ct. cl. 761, 9 F. Supp. 1016, 15 AFTR 439, in December, 1935, that when the taxpayer filed an amended return after the statute of limitations had expired, and paid the tax shown thereon to be due, he had waived the limitation and could not recover the amount paid. So if the filing of the amended return had the effect of extending the statu-

tory period of limitations, then the Commissioner should have corrected the erroneous depreciation deductions just as he admits he would have corrected them in any other case where he was specifically called upon to do so before the period of limitations had expired.

Although there is a statute of limitations against making assessment of additional taxes, there is no statutory period of limitations against the review of a tax return and the correction of errors contained therein when the tax liability is not affected thereby. The appellant believed and had good reason to believe that the erroneous deductions in the returns for 1932 to 1935 would be corrected. It was not until 1945 that the negotiations between the appellant and the Commissioner about the corrections which were once made by the agents of the Commissioner and were rejected by the Commissioner, were concluded and the amended returns for 1932 to 1935 were filed immediately thereafter. The Commissioner refused to consider the amended returns on the ground that they were filed after the statute of limitations had expired. Since no assessment of additional taxes was involved, and since there is no limitation period against the correction of a return where no additional tax is involved, the Commissioner's excuse for his refusal to consider the amended returns is without justifiable foundation.

Aside from the filing of the amended returns however, the Commissioner's agents knew about the erroneous depreciation deductions when they audited

the returns before the regular statutory period of limitations on assessments for the years 1932 to 1935 had expired and as was argued in appellant's opening brief (pp. 58-72) the Commissioner's agents were then duty bound to disallow the erroneous deduction and to "advise the taxpayer with respect to the schedule and supporting information which must be prepared" (Mim. 1470 CB XIII-1, p. 59, CB XV-2, p. 148) to establish the correct deduction. Therefore, the Commissioner's office practice of deferring the computation of corrections of deductions *known to be erroneous* on returns showing large losses, until such time as those deductions entered into the computation of a tax liability for some later year, cannot be considered an allowance of the deduction, but rather *must* be considered a *disallowance* of the deduction and a deferment of the computation of the correct allowable deduction, since as argued in appellant's opening brief, pp. 58-64, the Commissioner has no authority to allow an illegal deduction, and *must* disallow the deduction upon discovery of its illegality. As also pointed out in appellant's opening brief, pp. 64-66, the only exception to this rule is where the taxpayer is estopped from invoking it, and there is no basis for estoppel in this case.

It is respectfully submitted that the Commissioner was legally bound to *disallow* the erroneous depreciation deductions taken by appellant on the original returns for 1932 to 1935, and therefore could not have allowed those deductions in law or in fact; and that he was morally and legally bound to determine the cor-

rect and "allowable" depreciation deductions for those years when determining the appellant's basis for depreciation for later years; and that he was not prohibited by any statute of limitations from determining the correct depreciation allowances for the years 1932 to 1935 or from considering the amended returns for those years which gave effect to the correction of the depreciation deductions. It is respectfully submitted that for the reasons set forth herein and in appellant's opening brief, the judgment of the District Court should be reversed.

Dated, San Francisco, California,
May 3, 1948.

Respectfully submitted,
GEORGE H. KOSTER,
Counsel for Appellant.